UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 981—September Term, 1974.

(Argued May 6, 1975 Decided August 13, 1975.)

Docket No. 75-7081

VINCENZO BURRAFATO and ANTONINA BURRAFATO,

Appellants,

v.

UNITED STATES DEPARTMENT OF STATE and
UNITED STATES IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

Before:

FEINBERG, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment entered in the Eastern District of New York, Walter Bruchhausen, *District Judge,* dismissing for lack of subject matter jurisdiction a complaint which sought declaratory and injunctive relief based on the claims that denial of a visa to an alien husband violated the constitutional rights of his citizen wife and that the failure of the Department of State to specify the reasons for denial of the visa denied the husband procedural due process.

Affirmed.

JOSEPH P. MARRO, New York, N.Y. (Martin L. Rothstein, and Fried, Fragomen & Del Ray, New York, N.Y., on the brief), *for Appellants.*

PETER A. GOLDMAN, Asst. U.S. Atty., Brooklyn, N.Y. (David G. Trager, U.S. Atty., and Paul B. Bergman, Asst. U.S. Atty, Brooklyn, N.Y., on the brief), *for Appellees.*

TIMBERS, *Circuit Judge:*

On this appeal from a judgment entered in the Eastern District of New York on January 22, 1975, Walter Bruchhausen, *District Judge,* granting defendants' motion pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the complaint which sought declaratory and injunctive relief, the essential issue is whether the district court correctly held that it lacked subject matter jurisdiction over the complaint which claimed that the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason by the United States Counsel in Palermo, Italy, and that failure of the Department of State in accordance with its regulations to specify the reasons for denial of the husband's visa application denied him procedural due process.

We affirm.

I.

Vincenzo Burrafato is a native and citizen of Italy. In 1961 he was married in Italy to Antonina Burrafato, a United States citizen. They are the parents of two children, 11 and 9 years of age, both of whom were born in Italy. In February 1970, Vincenzo applied to the United States Consul in Palermo for a permanent immigration

visa to the United States. The application was denied on the ground that he was ineligible under Section 212(a) of the Immigration & Nationality Act (the Act), 8 U.S.C. §1182(a) (1970). Upon request of appellants' counsel by letter dated September 22, 1971, the Visa Office of the Department of State reviewed the denial of the visa application and informed counsel by letter dated October 21, 1971 that "no facts were disclosed which would warrant a reversal of the original finding of ineligibility under [the statute]."

In the meanwhile, without waiting in Italy to learn whether his visa application would be granted, Vincenzo entered the United States illegally on February 17, 1970. When the Immigration & Naturalization Service learned of his illegal entry, he was served on December 7, 1972 with an order to show cause why he should not be deported pursuant to Section 241(a)(1) of the Act, 8 U.S.C. § 1251 (a)(1) (1970). At his deportation hearing, Vincenzo admitted that he had entered the United States without a valid immigrant visa or other entry document for permanent residence. Accordingly, on July 25, 1974, he was found to be deportable under 8 U.S.C. §1251(a)(1) (1970) by an immigration judge, but was granted the privilege of voluntary departure until November 25, 1974 pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e) (1970).[1]

In the meanwhile, on June 4, 1974 the instant action was commenced in the district court seeking the relief stated above. In an opinion filed January 21, 1975, the court dismissed the complaint. After a notice of appeal was filed on

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1 Burrafato does not challenge the correctness of the finding that he was deportable under Section 241(a)(1) of the Act.

The privilege of voluntary departure permits an alien to avoid the stigma of deportation and may facilitate the possibility of his reentry into the United States. *Strantzalis* v. *Immigration & Naturalization Service*, 465 F.2d 1016 (3 Cir. 1972).

January 24, the court, on application of appellants, on January 28 stayed deportation of Vincenzo and further stayed withdrawal of the privilege of voluntary departure pending this appeal.

II.

Whether the district court was correct in dismissing the complaint for lack of subject matter jurisdiction turns of course on the validity of the claims alleged.

With respect to the claim that denial of Vincenzo's visa application violated the constitutional rights of Antonina, it is sufficient to note that this claim is foreclosed by our recent decision in *Noel* v. *Chapman*, 508 F.2d 1023, 1027-28 (2 Cir. 1975), where we reaffirmed the rule that no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse. See also *Silverman* v. *Rogers*, 437 F.2d 102 (1 Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Swartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir.), *cert. denied*, 357 U.S. 928 (1958).

III.

A closer question is presented by appellants' claim that the failure of the Department of State, in accordance with its regulations, to specify the reasons for denial of Vincenzo's visa application denied him procedural due process.[2]

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2 This is one of those cases where, in order better to focus on what this claim is about, it may be helpful to emphasize what is *not* claimed.

Appellants do not claim denial of due process in the deportation proceedings which would give the federal courts jurisdiction to insure that administrative tribunals conform to the traditional standards of fairness encompassed by due process in determining whether aliens who have entered the United States are deportable. *Bolanos* v. *Kiley*, 509 F.2d 1023, 1025-26 (2 Cir. 1975); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Nor do appellants seek review of the denial of the visa application by the United States Consul in Palermo on grounds of lack of due

Appellants argue in essence that, in failing to specify under which of the thirty-one subsections of Section 212(a) of the Act Vincenzo was excluded, the Department of State did not comply with its own regulation, 22 C.F.R. §42.130 (1975), which requires it to inform an unsuccessful applicant for a visa of the reasons for denial of the visa and to allow the applicant an opportunity to refute the evidence of ineligibility that may have been used against him.[3]

This argument, as appellants' counsel acknowledges, must be considered in the light of repeated admonitions by the Supreme Court that the judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens. As recently as its decision in *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), the Court quoted with approval its earlier opinion in *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895):

> "The power of congress to exclude aliens altogther from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

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process. Indeed, counsel for Vincenzo specifically denied that any review of the consular determination was sought in the instant litigation. As we held long ago, "Whether the consul has acted reasonably or unreasonably, is not for us to determine. Unjustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. . . . It is beyond the jurisdiction of this court." *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2 Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

3 The government's affidavit in support of its motion to dismiss the complaint in the district court stated that the reason for denial of a visa to Vincenzo was his "association with organized criminal society" in Italy. Section 212(a)(27) of the Act was cited as the applicable section under which he was excludable.

Despite this strong reaffirmation of judicial policy by the Supreme Court, appellants nevertheless urge that *Mandel* supports their claim that the district court has subject matter jurisdiction. We disagree. In *Mandel*, the Supreme Court was confronted with a challenge to the Attorney General's refusal to waive exclusion of an alien on the ground that First Amendment rights of those who wished to hear the alien would be infringed. The Court held only that, when waiver is not granted for a "facially legitimate and bona fide reason", the courts will not "test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.

Likewise, the courts of this Circuit have interpreted *Mandel* to require justification for an alien's exclusion. In *MacDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y., October 10, 1972) (*MacDonald I*), a three-judge court ordered the Secretary of State to set forth his reasons for refusing to waive the ineligibility of an alien. Then in *MacDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y., May 6, 1974) (*MacDonald II*), Judge Tenney accepted the reasons tendered as "facially legitimate and bona fide." *Id.* at 14, quoting from *Mandel*, *supra*, 408 U.S. at 770.

In each of these cases—*Mandel*, *MacDonald I and MacDonald II*—the claim was grounded on an alleged violation of First Amendment rights of American citizens over which the federal courts clearly had jurisdiction. The significant distinguishing feature of the instant case is that no constitutional rights of American citizens over which a federal court would have jurisdiction are "implicated" here.

If Vincenzo were "legally" within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally. To give him rights due to his unlaw-

ful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstrapping and would encourage aliens to enter this country surreptitiously. See *Licea-Gomez* v. *Pilliod,* 193 F.Supp. 577, 582 (N.D. Ill. 1960).[4]

We hold, in short, that the district court correctly decided that it did not have subject matter jurisdiction to review what happened to Vincenzo in Italy or what he claims the Department of State did to him here.

Affirmed.

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4 We have carefully considered appellants' other claims and we find they do not provide any jurisdictional basis for their action.

DECISION AND ORDER OF THE HON. WALTER BRUCHHAUSEN, DATED 1/20/75 WITH ATTACHMENTS CONSISTING OF THE ADMINISTRATIVE ORDER TO SHOW CAUSE AND ORDER OF THE IMMIGRATION JUSTICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VINCENZO BURRAFATO and ANTONINA BURRAFATO,

Plaintiffs,

-against-

U.S. DEPARTMENT OF STATE and
U.S. IMMIGRATION & NATURALIZATION SERVICE,

Defendants.

Appearances:
FRIED, FRAGOMEN & DEL REY, ESQS.
Attorneys for Plaintiffs
MARTIN E. ROTHSTEIN, ESQ.
LEONARD L. FINKEL
Of Counsel

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York
Attorney for Defendants
PETER A. GOLDMAN, ESQ.
Assistant U.S. Attorney
Of Counsel

BRUCHHAUSEN, D.J.

The defendants, by Notice of Motion, dated October 3, 1974, returnable on October 30, 1974, moved for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint upon the ground of lack of jurisdiction of the subject matter of this action.

The plaintiffs instituted this action for declaratory relief, to have the plaintiff, Vincenzo Burrafato, deemed a lawful citizen of the United States, injunctive relief and to review the decision of the United States Foreign Consulate's denial of an immigration visa to him. In paragraph 2 of the complaint, the plaintiffs allege, viz:

> "Vincenzo Burrafato duly applied for an immigration visa to come to the United States as the husband of a United States citizen. He was refused a visa by the Consulate General of the United States in Palermo, Italy, on a finding of ineligibility under Section 212(a) of the Immigration & Nationality Act (8 U.S.C., Sec. 1182(a)). Such finding was affirmed by the U.S. Department of State."

The records of the Immigration and Naturalization Service and the Department of State disclose that in or about February 1970 the visa was denied pursuant to Section 212(a)(27) of the said Act (association with organized criminal society).

8 U.S.C. 1182 provides, viz:

> "Excludable aliens — General classes (a) except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States. * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."

On or about February 17, 1970, the plaintiff, Vincenzo Burrafato, entered this country at an unknown location as an illegal citizen, without having been inspected. Subsequent to his arrival, the Immigration and Naturalization Service caused an Order to Show Cause and Notice for a Deportation Hearing to be served upon him pursuant to 8 U.S.C. 1252, The Immigration and Nationality Act.

On or about December 7, 1972, the said plaintiff was served with an order by the Immigration and Naturalization Service to show cause why he should not be deported. He was represented by counsel at the hearing. Annexed and marked, Exhibit A, is a copy of the said order.

Also annexed hereto, and marked Exhibit B, is a copy of the decision of Immigration Judge Ira Fieldsteel, dated July 25, 1974, stating that "Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause."

In Noel v. Chapman, Circuit 2, dated January 3, 1975, the Court stated, viz:

> "Recently, in Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), the Court reaffirmed the plenary power of Congress, quoting with approval the opinion of the first Mr. Justice Harlan in Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895):
>
> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

In Kleindienst, supra, pages 769, 770, the Court stated:

> "In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.
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> "* * * We hold that when the Executive exercises this

power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment Interests of those who seek personal communication with the applicant."

Again in that case at pages 766, 767, the Court stated:

"Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens."

Upon due deliberation, it is ordered that the complaint be and it is hereby dismissed.

Copies hereof are being forwarded to the attorneys for the parties.

s/Walter Bruchhausen
Senior U.S.D.J.

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act.

UNITED STATES OF AMERICA:
In the Matter of
Burrafato, Vincenzo

Respondent.

File No. A20 345 134

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Italy and a citizen of Italy.

3. You entered the United States at an unknown place on or about February 17, 1970.

4. It was then your intention to seek employment and remain indefinitely in the United States;

5. You were not in possession of a valid immigrant visa or other entry document for permanent residence.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law: Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the possession thereof by said

Act or regulations made thereunder, under Sec. 212(a)(20) of the Act.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 W. Broadway, New York, N.Y., 14th floor on December 8, 1972 at 8:45 a.m., and show cause why you should not be deported from the United States on the charges set forth above.

Dated: December 7, 1972

IMMIGRATION AND NATURALIZATION SERVICE

s/Bar Lambert
ACTING DISTRICT DIRECTOR
NEW YORK DISTRICT

NOTICE TO RESPONDENT

Any statement you make may be used against you in deportation proceedings.

The copy of this order served upon you is evidence of your alien registration while you are under deportation proceedings, the law requires that it be carried with you at all times.

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry office will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which

your deportation may be directed pursuant to law; and upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to persecution in any such country on account of race, religion, or political opinion.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

DECISION OF THE IMMIGRATION JUDGE

(SAME TITLE)

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before November 25, 1974 or an extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Italy on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to —.

Copy of this decision has been served on respondent.

Appeal: Waived

Dated July 25, 1975

Place, New York, New York

s/
Immigration Judge

LETTER FROM DEPARTMENT OF STATE
DATED OCTOBER 21, 1971

Mr. Donald J. Sisk
Pavia & Harcourt
Attorneys and Counselors at Law
63 Wall Street
New York, New York 10005

Dear Mr. Sisk:

I refer to our letter of September 22, 1971 concerning the immigrant visa case of Mr. Vincenzo Burrafato.

The Consulate General at Palermo reported that Mr. Burrafato's case has been carefully reviewed by that office. However, no facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act.

While it is our sincere desire to cooperate in every way possible to clarify the matter, the grounds for the refusal are of a confidential nature and we are prohibited from divulging either the specific subsection of law under which the visa was refused or the facts which constituted the basis for the refusal. However, the Department has had access to the essential facts and is of the opinion that the denial was fully warranted under the terms of the law.

Sincerely yours,

s/George A. Berkley
George A. Berkley, Chief
Public Services Division
Visa Office